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No. 88-1404

In The

Supreme Court of the United States

October Term, 1988

MONSANTO COMPANY, ALLIED-SIGNAL, INC. AND EM INDUSTRIES INC.,

Petitioners,

v.

UNITED STATES OF AMERICA, SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL,

Respondents.

BRIEF OF AMICUS CURIAE ATLANTIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether this Court should review the decision by the Court of Appeals for the Fourth Circuit which affirmed the decision by the United States District Court for the District of South Carolina in applying section 107(a) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9601-9657 (1982) ("CERCLA") retroactively and in a manner which requires some users of a waste storage facility to bear joint and several liability for all costs of cleanup, notwithstanding their concededly minute contribution to the waste stored at the site.

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On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF OF AMICUS CURIAE ATLANTIC LEGAL FOUNDATION, INC. IN SUPPORT OF PETITIONERS

INTEREST OF AMICUS[1]

This case concerns the issue whether the constitutional safeguards of due process and constitutional protections against excessive punishment are violated by the retroactive imposition

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1 Pursuant to Rule 36 of the Rules of this Court, letters from counsel of record for the parties evidencing their consent to the filing of this brief have been filed with the Clerk of the Court.

of disproportionate liability in a case involving the application of section 107(a) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), 42 U.S.C. § 9607 (1982 & Supp. IV 1986) so as to require only a few generators of waste, who deposited their waste prior to the enactment of CERCLA, to bear the full cost of cleanup, notwithstanding the fact that the Government itself apportioned the volume of waste by allocating only 22.41% to the petitioners herein, and settled with waste generators to whom the Government allocated 77.5% of the volume, and where the petitioners contended at trial that (i) the burden was on the plaintiffs to show that petitioners' waste was at the site at the time of cleanup, (ii) the burden was on plaintiffs to show what portion of the waste was attributable to petitioners, and (iii) that the award against petitioners should be reduced by the pro rata share of the contribution to the harm by those waste generators who had settled.

The impact of this case will be significant, because the issue of liability for harm to the environment resulting from past actions, deemed safe and acceptable when taken, will arise with increasing frequency as the storage methods previously used are discovered to be inadequate, or substances that were deemed not to be harmful are later found to be toxic because of new scientific evidence or growing awareness of the deleterious impact of retention by the environment or humans of the toxic material and its cumulative effects are perceived. The costs of cleanup and cure may become vast, and their proper allocation give rise to significant economic and jurisprudential issues.

Amicus Atlantic Legal Foundation, Inc. is a not-for-profit,

tax exempt, legal foundation, incorporated in Pennsylvania. It is a public interest law firm whose mandate is to present balanced articulation of the public interest in litigations with broad impact and constitutional law significance, such as the instant case. The Foundation has appeared as amicus curiae before this Court in a number of cases involving public interest issues, most recently in support of petitioners in *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, No. 88-556 (October Term, 1988). The Foundation submits this brief to assist the Court in its determination whether there are significant questions presented in this case which warrant review by this Court, and to urge the Court to grant the petition for certiorari.

SUMMARY OF ARGUMENT

CERCLA is a landmark statute of very broad application, enacted to remedy an important, critical and urgent problem of national scope, namely the threat to the environment resulting from past disposal of hazardous or toxic waste. Many cases brought under CERCLA are pending, and each case usually involves many parties and complicated issues of fact. The procedural approach taken in this case below raises important issues affecting the substantive rights of petitioners and other "generator" defendants in CERCLA cases. By refusing to decide the issue of allocation of responsibility in one proceeding, the trial court and the Court of Appeals have created a situation which exacerbates the risk that only a few defendants out of many users of a waste disposal site may be required to contribute to cleanup costs, in this and other cases

in an amount far exceeding their fair share of such costs. This Court heard argument last week in *Browning-Ferris*, *supra*, and if it decides in that case (as we urged in our *amicus* brief there) that the Eighth Amendment and the Due Process Clause of the Fifth Amendment require that civil damages be subject to a rule of proportionality, the procedure and the result in this case raise grave constitutional questions.

Petitioner's damage exposure is constitutionally disproportionate to any equitably allocable share attributable to their activities. For example, Monsanto could be held liable for the entire costs of $1.8 million and yet Monsanto contributed only 1.91% of the waste. Such a result would be punitive in nature and violates the Eighth and Fifth Amendments.

The retroactive application of CERCLA to petitioners violates the Due Process and Takings Clauses of the Fifth Amendment because it imposes liability for acts lawful when done.

The combined effect of the application of joint and several liability and retroactive application of CERCLA is to impose liability on parties who are not the causal agents of the harmful, but perfectly licit, acts of others in the past.

ARGUMENT

I. THE RULING BELOW RAISES CONSTITUTIONAL ISSUES OF EXCESSIVE DAMAGES

While the majority opinion of the Court of Appeals acknowledged the legitimacy of petitioners' concern that they might be responsible for paying more than their equitable share

of cleanup costs, *United States v. Monsanto Co.*, 858 F.2d 160, 173 (4th Cir. 1988), it assumed, as did the district court, that any inequitable allocation of costs would be rectified by a subsequent action for contribution. That assumption may be incorrect, and even if not incorrect, imposes an intolerable burden both on the petitioners and on the judicial system. The petitioners are precluded from seeking contribution from the settling defendants because CERCLA § 113(f)(2) provides that releases obtained by the settling defendants protect those defendants from claims for contribution. Thus, the only parties against whom petitioners can make claims for contribution are the plaintiffs below, the United States and the State of South Carolina (both of whose agencies were also generators of waste stored at the site) and non-settling private generators; such a claim against South Carolina may be barred by the doctrine of sovereign immunity. In *Pennsylvania v. Union Gas Company*, 832 F.2d 1343 (3d Cir. 1987), *cert. granted*, 108 S.Ct. 1219 (1988), *argued*, October 31, 1988 this Court is considering whether CERCLA has the effect of waiving a state's immunity. Had the trial court or the Court of Appeals mandated consolidation of all claims, this anomaly could have been avoided, for, by suing, South Carolina waived any sovereign immunity claim as to petitioners' defense of set-off. Therefore, the ability to obtain contribution is not only wrongly and prejudicially delayed, it is also greatly curtailed as the settling defendants are immune and South Carolina probably is.

The concern for disproportionate liability is not merely hypothetical. In this case, the district court and the Court of Appeals each approved settlements with other generator defendants, without reducing the judgment against petitioners. By the

Government's own reckoning, Monsanto's share, by volume, of the waste generated was 1.91%, while that of AquAir, another defendant, was 1.75%. The total amount of the judgment below was $1,813,624.01 (of which $1,561,134.55 was awarded to the United States and $252,489.46 to the State of South Carolina). *United States v. South Carolina Recycling and Disposal, Inc.*, 653 F.Supp. 984 (D.S.C. 1984) (hereafter "*SCRDI*"). While this case was on appeal to the Fourth Circuit Court of Appeals, plaintiffs and AquAir entered into a settlement, which provided that AquAir would pay $5,000.00 (only 0.27% of the response costs), and that "AquAir shall not be liable for claims for contribution" for the cleanup of the Bluff Road site. Even the minute amount paid by AquAir was not deducted from the judgment against petitioners herein; thus Monsanto, with approximately the same aliocable share of the waste material as AquAir, is jointly and severally liable for more than 360 times the amount paid by a defendant with the same through-put of waste. The Court of Appeals' approval of this settlement, and its failure to reduce petitioners' liability, illustrates a serious flaw in CERCLA § 113(f)(2).

We submit that the grossly disproportionate liability of non-settling defendants in CERCLA response recovery actions raises a constitutional issue of excessive fines and denial of due process. Although recovery actions under CERCLA have a remedial purpose when viewed in gross, the statute as applied, using the "joint and several" liability principle, when combined with the bar against contribution from settling defendants, results in damage awards against the remaining defendants (who are already handicapped by the draconian burden of proof rule adopted by the court below) that become, in effect, punitive,

not compensatory. Here, for example, by permitting double recovery by plaintiffs (since the amounts paid in settlement were not deducted from the judgment in favor of plaintiffs), plaintiffs received a windfall. Moreover, by permitting recovery from a defendant far in excess of his equitable share, the recovery as against that defendant becomes punitive.

Such excessive recoveries, we submit, fit two of the criteria enumerated by this Court in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-169 (1963) for determining whether a sanction is punitive and bounded by the due process protections usually afforded in criminal proceedings.[2] The *Mendoza-Martinez* criteria were more recently approved by this Court in *United States v. Ward*, 448 U.S. 242, 249-251 (1980).

The "substance over form" approach sanctioned by this Court in *United States v. Ward*,[3] compels the conclusion that the

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2 The criteria (with those applicable here in italics) are:

"[1] Whether the sanction involves an affirmative disability or restraint, *[2] whether it has historically been considered as a punishment,* [3] whether it comes into play only on a finding of *scienter*, [4] whether its operation will promote the traditional aims of punishment–retribution and deterrence, [5] whether the behavior...is already a crime, [6] whether an alternative purpose to which it may be rationally connected is assignable for it, and *[7] whether it appears excessive in relation to the alternative purpose assigned....*" 372 U.S. at 168-169.

3 In that case, this Court held that the $500 fine for water pollution was not sufficiently penal to warrant the "procedural guarantees normally associated with criminal prosecutions," (448 U.S. at 253) because the fines were used to finance cleanup and defray the costs of administering the Water Pollution Control Act. (448 U.S. at 246). A significant

(continued...)

application of CERCLA by the courts below effects punishment, not merely compensation, and that Eighth Amendment and Fifth Amendment due process constitutional safeguards are violated when the statute is so applied. Most apposite is the principle of proportionality, recognized by this Court in *Solem v. Helm*, 463 U.S. 277 (1983). Here, Monsanto could be liable for damages 360 times its equitable share; in *Browning-Ferris*, *supra*, the punitive damages were "only" 117 times the compensatory damages. If this Court agrees with petitioners and *amicus* Atlantic Legal Foundation in *Browning-Ferris* that such an award violates the Eighth and Fifth Amendments, the inequitable allocation of recovery costs made possible by the decisions below in this case violates those same constitutional safeguards.

II. THE IMPOSITION OF JOINT AND SEVERAL LIABILITY VIOLATED CONSTITUTIONAL LIMITATIONS ON RETROACTIVE GOVERNMENT ACTION.

The decisions of the courts below imposing liability on petitioners ignore or misconstrue constitutional limitations on the creation and application of retroactive liability. The conduct of the petitioners in dealing with the Bluff Road waste site complied fully with the requirements of the existing law at the time they generated their waste. The Government never argued

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[3](...continued)
difference between the case at bar and *Ward* is the sharp contrast between a $500 fine and a possible liability of $1.8 million imposed on a generator of less than 2% of the waste material.

otherwise in the trial court and did not even name petitioners as defendants until after the enactment of CERCLA in December 1980.

The decisions below impose multi-million dollar liability on these generators, and on others in similar cases, solely on the basis of lawful conduct that ended months or years before CERCLA's enactment. As harsh as this is by itself, however, the statutory construction in this case by the courts below has made the retroactive application of Section 107 violative of the Fifth Amendment.

First, any requirement of causation or a causal nexus as a predicate for imposing liability was eliminated. Liability will be imposed, the Trial Court and the Court of Appeals held, if the Government shows merely that "at one time," waste materials from these generators like those present at the time of release "were on the site." (SCRDI, 653 F.Supp. at 991-92; 858 F.2d 160, 169-70). Second, the courts below held that Section 107 permitted the imposition of joint and several liability on these generator defendants for the total cleanup costs, regardless of the volume of their waste that may once have been present at the site. The imposition of such drastic retroactive liability on these facts cannot be considered solely remedial. The courts' application of the Section 107 has a punitive consequence. The Fifth Amendment has long been held to proscribe the imposition of such liabilities retroactively. But even apart from its punitive character, this interpretation and application of Section 107 far exceeds the constitutional limits on the retroactive creation of new liability for previously lawful conduct. The retroactive imposition of liability against these generators is inconsistent with the Due Process and Takings Clauses of the

Fifth Amendment.

A. The Retroactive Application Of CERCLA In This Case Violates Fifth Amendment Due Process Requirements.

The retroactive application of CERCLA § 107 on the facts of this case would be unprecedented. We do not believe that any prior case has imposed such extraordinary sanctions for previously lawful conduct. Rather, in the cases most directly analogous to this, the federal courts have avoided or invalidated retroactive imposition of liability as violative of the Article I prohibition against *ex post facto* laws, the Due Process Clause, or the Takings Clause of the Fifth Amendment.

Article I, § 9 of the Constitution prohibits Congress from enacting "any law 'which imposes a punishment for an act which was not punishable at the time it was committed.'" *Weaver v. Graham*, 450 U.S. 24, 28 (1981) (quoting *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 325-26 (1867)). *See also Galvan v. Press*, 347 U.S. 522, 531 (1954); *Ex parte Garland*, 71 U.S. 333 (1867). This prohibition "assure[s] that legislative Acts give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed." *Weaver v. Graham*, 450 U.S. at 28-29. The "critical question [in determining if the prohibition of *ex post facto* laws applies] is whether the law changes the legal consequences of acts completed before its effective date." *Id.* at 31. If it does, the law is retroactive in effect and absolutely prohibited.

While the prohibition against *ex post facto* laws has traditionally been applied only to prosecutions for crime, *see*

Galvan v. Press, 347 U.S. 522, 531 n.4 (1953) its constraints have been incorporated as a component of the Due Process Clause to proscribe judicial and administrative action and even to the adoption of new procedural rules that would deny a litigant its right to a fair hearing if given retroactive effect. *Bouie v. City of Columbia*, 378 U.S. 347, 354-55 (1964). *See also* Justice Frankfurter's comment in *Galvan* on the relationship of the *ex post facto* prohibition and substantive due process. 347 U.S. at 531. *See generally*, Jeffries, *A Comment on the Constitutionality of Punitive Damages*, 72 Va. L. Rev. 139, 151-52 (1986). The principle should be applied in civil cases, where the imposition of liability can "fairly be designated punishment for past acts." *DeVeau v. Braisted*, 363 U.S. 144, 160 (1960), (plurality opinion by Frankfurter, J.)

Applying this principle, the Court of Appeals for the Second Circuit recently held that the new treble damage provisions of the Trademark Counterfeiting Act of 1984 were "punitive" and could not be applied retroactively. *Louis Vuitton S.A. v. Spencer Handbags Corp.*, 765 F.2d 966, 972 (2d Cir. 1985). These provisions were enacted to enhance the compensatory relief available to plaintiffs in trademark infringement cases, but they also had the effect of creating a new civil penalty of substantial proportions, as does section 107 of CERCLA. Plaintiffs in that case sought to impose the treble damage provision on pre-enactment conduct. The District Court and the Second Circuit rejected this claim on the ground that retroactive application of such a statute would present serious constitutional questions under both the *ex post facto* clause and the Due Process clause. 765 F.2d at 970-72.

Due process does not generally allow retroactive

application of statutes that have "harsh and oppressive" consequences. *See United States Trust Co. v. New Jersey*, 431 U.S. 1, 17 n.13 (1977); *Welch v. Henry*, 305 U.S. 134, 147 (1938). In *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 17 (1976), on which the Circuit Court relied so heavily in affirming retroactive liability in the instant case, this Court said "The retrospective aspects of legislation ... must meet the test of due process ..."

In *Ralis v. RFE/RL, Inc.*, 770 F.2d 1121 (1985), the District of Columbia Circuit refused to apply the Age Discrimination in Employment Act ("ADEA") retroactively. The plaintiff in that case had been required to retire in 1981, at age 65, by his overseas employer, at which time ADEA did not apply to non-U.S. employers. In 1984, however, Congress amended the ADEA to cover overseas employers of American citizens, and plaintiff sought to recover based on the new provisions. The court rejected this retroactive application in the absence of an explicit mandate by Congress:

> [T]he retrospective imposition of an obligation giving rise to a substantive liability is not lightly to be undertaken absent an express Congressional intent to render unlawful an act that was legal at the time it was done. In fact, merely to state the proposition that an obligation - imposing statute should be retroactively applied is to suggest the extraordinary nature of that notion.

770 F.2d at 1126.

As the court stated in *Ralis*, such a retroactive creation of a new cause of action is fundamentally inconsistent with Due

Process:

> The very notion of law is that known, or at least knowable, rules govern the conduct and affairs of those subject to the law's reach. It is quite incompatible with our fundamental notions of law that an act lawful at the time it was done can, at the stroke of the legislative pen, be rendered unlawful and the actor called to account for a completed, now-condemned deed in the halls of justice ...
>
> Retroactive impositions of civil liability are conceptually of a piece with *ex post facto* criminal laws. Instead of packing the actor off to jail, the legislature, with the judiciary's cooperation,...requires the payment of sums of money and the reordering of affairs, such as here Dr. Railis's prayer for back pay and reinstatement to a post filled over four years ago.

770 F.2d at 1127. The court refused to apply the statute retroactively to previously lawful conduct, although the legislative history on point suggested that Congress intended to deal with pre-enactment conduct. *Id.* at 1127.

The Court in *Ralis* cited *Bradley v. Richmond School Board*, 416 U.S. 696, 711 (1974) for the proposition, which we submit is directly applicable here, that the courts will not enforce retroactive liability, even where it is expressly mandated by the statute, if to do so would be "manifestly unjust".

While Section 107 is not a criminal statute, and damages awarded under it are to compensate the government for response costs, it is punitive when interpreted and applied, as it was below, to impose total liability for cleanup costs without requiring evidence of a casual connection, based on conduct that was completely lawful when undertaken. Its impact in cases such as this is "manifestly unjust".

B. The Fifth Amendment Limits Societal Cost-Shifting Through Retroactive Imposition of Liability

The Fifth Amendment permits the retroactive imposition of financial responsibility only when such burden is reasonably related to an individual's own past conduct and commitments. *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 212, 228 (1986) (O'Connor, J., concurring). The Fifth Amendment prohibits "forcing some people alone to bear public burdens which, in...fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

The interpretation of CERCLA § 107 by the Court of Appeals in this case directly contravenes these principles. The retroactive imposition of joint and several liability, without regard to any actual connection to past conduct, for the cleanup costs fairly attributable to other responsible parties, creates a system which "denies due process of law by taking the property of one and bestowing it upon another." *Railroad Retirement Board v. Alton Railroad Co.*, 295 U.S. 330, 350 (1935). Even if petitioners were responsible for a fraction of the waste material present at the time of cleanup (which the Government was not required to prove in this case), the total cost of cleanup has

been impermissibly allocated to these three parties by imposing joint and several liability. The Government's failure to name as defendants any of the various federal and state agencies admittedly responsible for waste at the site provides the most striking example of selective cost-shifting.

The imposition of joint and several liability has also forced these generators to pay the cleanup costs for other private parties responsible for materials at the site. The Government purpose is to shift the cost of cleanup to some (but not all) generators, rather than to itself determine, initially, who were the likely responsible parties. Because of joint and several liability, the Government will recover the total cleanup costs from those generators it selects as defendants, and then leave those entities to recover, if they can, from the parties actually responsible. As shown in point I, *supra*, this may not be possible as to a state agency. As a practical matter, given the often lengthy time between deposit of waste and final judgment, it may be impossible for defendants to recover from other past private users of a site, many of whom may no longer be in existence, and many of whom may not be financially capable of bearing their equitable share of the cleanup costs. We submit that this is nothing more nor less than taking the property of petitioners for the benefit of others, both innocent and culpable. Such a policy and practice, making culpability essentially irrelevant, deters rather than encourages, conscientious generators from exercising maximum care and expending maximum effort and expense to ensure that their hazardous waste does not pollute the environment. If even the most careful can, at the option of the Government be held liable for <u>all</u> the costs of curing the problem, economic

rationality dictates the least expenditure be made to prevent the problem.

C. The Rule of *Turner Elkhorn* Does Not Permit Retroactive Imposition Of Liability In This Case.

The Circuit Court held that the retroactive application of Section 107 was supported by this Court's decision in *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976). This is an erroneous interpretation of the *Turner Elkhorn* decision, and if allowed to stand, it would have far-reaching mischievous consequences. A proper reading of *Turner Elkhorn* and subsequent opinions by this Court shows the lower courts' error.

Turner Elkhorn involved provisions of the Black Lung Benefits Act of 1972, 30 U.S.C. §§ 901, *et seq.* (1976), that enable former coal miners and their survivors to obtain compensation from mine owners for death or disability due to black lung disease. Mine operators presented a facial challenge under the Due Process Clause to the retroactive elements of this statute, which required the owners to compensate miners who had left coal mine employment before the effective date of the statute. This Court rejected that facial challenge, but in so doing, it construed the statute in a way that avoided the constitutional problems presented by the Circuit Court's application of Section 107. The Circuit Court in this case simply ignored these critical limitations.

The most important of these limitations is that in *Turner Elkhorn*, this Court required a definite causal connection between the compensable injury and the mine operator before

the mine operator could be held liable. The Black Lung Benefits Act required adjudication of individual responsibility for past employees, and no operator would be liable for disabilities or deaths that were not attributable to his own activities. As the Court said there:

> "In sum, the Due Process Clause poses no bar to requiring an operator to provide compensation for a former employee's death or disability ... arising out of employment in its mines, even if the former employee terminated his employment ... before the Act was passed." 428 U.S. at 19-20 (emphasis added)

Accordingly, this Court upheld retroactive imposition because the Act "allocated[d] to the mine operator an actual, measurable cost of his business." 428 U.S. at 19. If responsibility cannot be assigned to a particular mine operator, the Black Lung Benefits Act places the burden of payment on the Government, rather than on private parties. 30 U.S.C. §§ 932(c), 934 (1976). These provisions are in stark contrast to joint and several liability under CERCLA as applied here, which compels a few generator defendants to bear the burden for government agencies, insolvent parties and any other waste generator, without actual proof that the generator defendants were actually responsible.

Justice O'Connor's recent concurring opinion (joined by Justice Powell) in *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 228 (1986) emphasizes the need for a nexus between acts of the party to be charged and imposition of liability. That case concerned provisions of the Multiemployer Pension Plan Amendments Act, Act of 1980, 29 U.S.C. §§ 1381-

1461 ("MPPAA") which imposed retroactive liability on companies that withdrew from certain defined benefit pension plans created for their employees. Unlike the application of Section 107 here, those retroactive provisions were directly related and at least roughly proportionate to previous commitments made by the companies affected, and the Court therefore concluded that these provisions did not on their face violate the Takings Clause. Nevertheless, Justice O'Connor, joined by Justice Powell, wrote a separate opinion to emphasize the constitutional problems that would arise if this retroactive liability were asserted "in the absence of any connection between the employer's conduct and some detriment to the employee." 475 U.S. at 229; *see also Turner Elkhorn, supra* at 19, 24-26. Justice O'Connor emphasized that retroactive withdrawal assessments could be so disproportionate to the obligation assumed as to create a Takings or a Due Process problem. *Id.* at 230-31.

MPPAA, unlike CERCLA as applied in this case, was intended to ensure that "an employer withdrawing from a multiemployer plan w[ill] ... complete funding its fair share of the plan's unfunded liabilities...." *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 723 n.3 (1984) (emphasis added)

This case presents precisely the type of retroactive application of undifferentiated liability that this Court eschewed in *Turner Elkhorn* and *Connolly*.

CONCLUSION

In this case two slightly suspect principles, which sometimes have benign impact, have been applied by courts below to a grievous end. Joint and several liability, when combined with retroactive application, deprived petitioners of important constitutional protections.

This Court should grant a writ of certiorari and, on the merits, reverse the judgment below.

Dated: New York, New York
April 28, 1989

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